No._____

In The Supreme Court of The United States

May Term, 1977

JERRY G. MEAGHER, an incompetent person, by and through his Guardian ad Litem, DOROTHY O. MEAGHER,

76-1550

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD F. GERRY
110 Laurel St.
San Diego, California
92101

Counsel for Petitioner

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INTRODUCTION

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the decision of the United States District Court for the Southern District of California, entered on February 7, 1977.

OPINION BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix B hereto.

JURISDICTION

The judgment, printed in Appendix A hereto, which is sought to be reviewed is dated February 7, 1977 and was entered on that date.

The jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Have not twenty-five years of changes in the military done away with any justification for the Feres doctrine?

2. Does not the Feres doctrine result in arbitrary, capricious discrimination against military personnel on active duty?

3. On what rationale may an unconscious Navy enlisted man undergoing elective surgery for a non-service connected medical problem be considered on active duty subject to the commands of his military superiors?

4. Is not the express exclusion to the Federal Tort Claims Act found in section 2680(j), precluding claims arising

out of the combatant activities of the military and naval forces during time of war, a sufficient limitation to protect the "peculiar" interests of the military?

5. Has not the immunity afforded military hospitals and medical personnel by the Feres doctrine resulted in shockingly inadequate and substandard health care for millions of American servicemen and their dependents?

6. Has not the concept of a "civilian army" replaced the traditional low-status position of military enlisted personnel expressed by the Feres court as "the peculiar relationship between a serviceman and his superiors", which formed the only basis of the Feres doctrine which has not been eroded by subsequent decisions?

7. Does the vague, ill-defined "incident-to-service" standard of the Feres doctrine meet modern constitutional requirements for fairness and uniformity of application?

8. Is it not the responsibility of this Court rather than the legislative branch of the federal government to review the constitutionality and justification of the doctrine created by the judiciary over twenty-five years ago?

STATEMENT OF THE CASE

On January 17, 1974, ETNSN Jerry G. Meagher, USN, was admitted to the Naval Regional Medical Center in San Diego, California for elective surgery. Meagher was a healthy 22 year old assigned for duty aboard the USS Halsey. The surgery was to remove a small lipoma gradually enlarging in the subcutaneous tissue of the left upper arm. The mass to be removed was otherwise completely asymptomatic and unassociated with systemic symptoms. The condition in no way interfered with Meagher's military duties, and surgery was not necessary but entirely elective.

A physical examination was performed on admission and revealed all aspects of good health and normal vital signs. Admission laboratory work was completely within normal limits.

On January 18, 1974, the patient received preoperative medication and an intrascalene peripheral nerve was attempted. The block was unsatisfactory and was repeated on two separate occasions then supplemented with barbituates, narcotics and tranquilizers.

At the conclusion of the operation the patient experienced a cardiac arrest. The operating room personnel restarted his heart and transferred him to a recovery room. While in the recovery room he suffered another

episode of hypoxia. Only then was the hospital trauma team called in. Efforts were made by the trauma team to resuscitate the plaintiff; but despite cardiopulmonary stabilization, the patient's neurological status failed to improve. Electroencephalograms showed diffuse cortical brain damage with no evidence of improvement.

The patient remains in a comatose state, and it is the opinion of the Medical Board that he will undergo no significant neurological improvement. The injury was obviously the result of medical negligence on behalf of surgical personnel at the military hospital.

On June 12, 1974, an administrative claim for damages was timely presented to the Commandant, Eleventh Naval District, San Diego, California, pursuant to the provisions of the Federal Tort Claims Act, section 2675 of Title 28 of the United States Code. The United States of America rejected the claim on August 6, 1974.

A complaint for damages for Jerry G. Meagher's personal injuries suffered as a result of the negligence of government employees at the Naval Regional Medical Center at San Diego, California, was brought on October 15, 1974, pursuant to sections 1346(b), 2671, 2674, and 2675 of Title 28 of the United States Code.

On May 27, 1975, the motions of

the defendant United States of America for dismissal and for summary judgment were granted by the United States District Court for the Southern District of California. The decision of the District Court held there was no genuine issue of material fact in that the plaintiff was on active duty with the United States Navy and injured as a result of negligence by medical employes of the United States Navy. The court found the United States of America entitled to judgment as a matter of law under the doctrine set forth in Feres v. United States, 340 U.S. 135 (1950).

The judgment granting the defendant's Motion for Summary Judgment, was entered on June 3, 1975. Pursuant to section 1291 of Title 28 of the United States Code, petitioner appealed the District Court's judgment to the United States Court of Appeals for the Ninth Circuit.

On February 7, 1977, the Ninth Circuit affirmed the District Court's judgment, noting "The result is extremely harsh, but unless and until the Supreme Court overturns or modifies Feres, we are compelled to follow it."

REASONS FOR ALLOWANCE OF THE WRIT

Our sense of justice is offended by a wrong without a remedy even where the tortfeasor is the United States of America. The doctrine of sovereign immunity was swept away by Congress in 1946 with the passage of the Federal Tort Claims Act.

That Act, referred to herein after as the FTCA, lists separately certain express exclusions. These exclusions which are there set forth seem to fall into three general categories:

those relating to claims arising from the performance of discretionary functions, those relating to claims which arise from particular areas of governmental activity, and those relating to claims stemming from particular types of torts.

None of the express exclusions relate to or address certain classes of claimants. However, the Supreme Court of the United States in Feres v. United States judicially created an implied exclusion barring recovery under the FTCA for injuries incurred by servicemen on active duty where the injury is "incident-to-service."

Had Congress in the FTCA set forth such an ill-defined classification, it would have been attacked as constitutionally vague. Also, the incident-to-service restriction against one category of citizens by Congress would have been

subject to attack as an arbitrary and capricious discrimination.

The fact that the judiciary rather than the legislative branch created this discriminative exclusion does not prevent attack upon it for constitutional reasons. This Court has recently reversed previous decisions which had excluded other classifications of persons without justification. In United States v. Muniz, 374 U.S. 150 (1963), a long-standing implied exclusion barring recovery by federal prisoners was struck down by this Court. In United States v. Brown, 348 U.S. 110 (1954), another implied exclusion preventing veterans from recovering was eliminated even though injuries to veterans are compensable under veteran's benefit laws.

The Feres doctrine was created by this Court. The exclusion of service personnel from the sweeping provisions of the FTCA, which deleted no class of persons expressly, raises constitutional issues. This Court is the forum in which constitutional arguments should be considered, not the Congress. The responsibility of Congress is primarily for the financial and implementation aspects of legislation, not the Constitutional issues.

The Feres doctrine was created by this Court; 25 years have passed during which it has been tested in thousands of cases; it has been harshly criticized by servicemen, their advocates, and by the judiciary in the District Courts and the Circuit Courts which have been compelled to follow it.

I

JUDICIAL CRITICISM OF FERES DOCTRINE

One continuing difficulty with the incident to service standard is that the Supreme Court in Brooks v. United States, 337, U.S.49 (1948), reflected a liberal view of the new legislation and held a serviceman injured through federal negligence while away from his military base on leave could sue and recover under the FTCA.

One recent comment noted "The courts have experienced great difficulty in the Brooks-Feres distinction, sometimes reaching peculiar results." Moreover, criticism of the Feres doctrine has not been raised only by advocates for injured persons. The opinions are filled with expressions of judicial displeasure.

In Mills v. Tucker, 499 F.2d 866, 867 (1974) the court denounced the Feres decision as "the source of much confusion."

In Ritzman v. Trent, 125 F.Supp. 664 (1954) where the injured serviceman, although on active duty at Fort Bragg, was repairing his private car at a time when all personnel were relieved of specific military duties District Judge Gilliam wrote "This, to me, is a close question and but for the Feres case I would have a different view."

A 1973 case, James v. United States,

358 F. Supp. 1381, 1386 (1973) contained this strong outcry:

> "I hold the Feres doctrine bars recovery under the Federal Tort Claims Act in this case. This holding gives me little pleasure. An injustice has been done in this case and it ought to be remedied."

In a decision from the Third Circuit which also dealt with medical malpractice, Peluso v. United States, 474 F.2d 605, 606 (1973) criticism from the bench amounted to an appeal to the Supreme Court to reconsider Feres:

> "If the matter were open to us we would be receptive to appellant's argument that Feres should be reconsidered, and perhaps restricted to injuries occurring directly in the course of service. But the case is controlling. Only the Supreme Court can reverse it. While we would welcome that result we are not hopeful in view of the number of recent instances in which, having been afforded the opportunity, it declined to grant certiorari. Possibly the only route to relief is by an application to Congress. Certainly the facts pleaded here, if true, cry out for a remedy."

In addition, the harshness of the incident-to-service concept has been attested to by the hundreds of claims which have been brought under the FTCA by servicemen who feel themselves inadequatly compensated by existing military compensation systems. Georgia Bar Journal, vol. 19, p.381, 382 (1956).

II

REVIEW OF THE FERES DOCTRINE DEMANDED IN LIGHT OF CHANGES IN MILITARY

Considering the clamor of criticism from injured servicemen, their advocates, and individual judges who feel compelled to apply the unfair Feres doctrine, the concept should be reviewed in light of the changes made in the military over the past twenty-five years. It is time to reconsider the incident-to-service standard and formulate a new one which can be applied more fairly and justly.

Most importantly, vast changes have occurred within the military itself. When the Feres doctrine was first announced in 1950, the serviceman occupied the traditional low-status position in society which began in the days when foot-soldiers were captives enslaved in conquest and impressed into military service.

Today the concept of a civilian army has brought significant changes. Enlisted personnel consist of those who have chosen the military as a career, not made up, as in the past, by those

portions of society that could not hold better jobs. Military barracks no longer bear a startling resemblance to prison facilities but have been replaced by housing units similar to those in the civilian sector.

The strict regulations formerly necessary to maintain discipline are being relaxed in all areas. The new attitudes are reflected across the board as former patronizing attitudes of superior officers toward enlisted personnel are being eliminated and military salaries are being increased to compare more favorably with those in civilian life.

There is, therefore, no justification for the continuation of inadequate military hospitals. Service personnel and their dependents are entitled to good hospital and medical facilities. If the government chooses to provide health care, it has the duty to provide adequate facilities. Indian Towing Co. v. United States, 350 U.S. 61 (1955).

It has become evident that inferior, substandard health care goes hand-in hand with immunity from tort liability. Despite the record of alarming numbers of medical negligence injuries, little has been done by Congress or the military itself to improve medical care provided for millions of Americans.

Balboa Navy Hospital in San Diego is a prime example of this shocking situation. Seventy-five percent of the

civil cases handled each year by the United States Attorney for the Southern District of California involves medical negligence at Balboa Hospital. (Speech of Terry J. Knoepp, U. S. Attorney, October 19, 1976).

Most of the victims of this medical incompetence are military persons unable to recover adequately for their injuries because of the Feres doctrine. The United States Supreme Court adopted this harsh exclusion; the Court should not wait for Congress to act; the situation cries out for judicial action.

III

INCIDENT-TO-SERVICE STANDARD: A VAGUE CONCEPT IMPOSSIBLE TO APPLY UNIFORMLY

The phrase is vague and imprecise and has resulted in unnecessary litigation. The United States Supreme Court's failure to provide a carefully-defined standard has required a case by case determination of whether the claimant's injury was in fact incident-to-service. Marquette Law Review, vol. 49, p.612 (1966).

> "It is interesting that the Court has adopted such a vague and meaningless standard even though it had previously condemned the same language as 'deceptively simple and litigiously prolific' in a workman's compensation case dealing with the problem of whether or not

> a claimant's injury arose out of and in the course of his employment". 19 Georgia Bar Journal 381, 382 (1957).

The strongest criticism of the standard is the difficulty of application since courts striving to reconcile Brooks and Feres stress different parts of the decisions. Western Reserve Law Review, vol. 18 p. 1788, 1794 (1967). Over the years some courts have interpreted incident-to-service to mean something quite different than what it originally meant or than the interpretation other courts have placed on it.

Apparently, the original Feres and Brooks decisions emphasized active duty status, which excluded those on pass, liberty and furlough, and drew the line there. Many recent cases have followed this line of reasoning - Barnes v. United States, 103 F.Supp. 51 (1962), Brown v. United States, 99 F. Supp. 685 (1951), and Zoula v. United States, 217 F.2d 81, 84 (5th Cir. 1954).

The court in Henninger v. United States, 473 F.2d 814, 816 (9th Cir. 1973) used this interpretation:

> "Feres absolutely bars Federal Tort Claims actions by servicemen injured while on active duty and not on furlough."

Other courts have used the "line of duty" concept mentioned in Feres and have based recovery under the Act on

whether the injury was incurred while the serviceman was acting in the line of duty. Archer v. United States, 217 F.2d 548, 552 (1954) and O'Brien v. United States, 192 F.2d 948, 949 (1951)

illustrate the use of this interpretation of incident-to-service.

The Sixth Circuit has concluded that "in the course of military duty" properly describes the origin of service-related injuries non-recognizable under the Act. McCord v. United States, 377 F.Supp. 953 (1972).

The court in Gursley v. United States, 232 F.Supp. 614 (D.C. Colo. 1964) described the test it applied as consisting of "...the distinctions relative to varying degrees of proximimity between the particular serviceman's injury and the particular geographical status and military function of the activity in which the serviceman was engaged while injured."

Still other courts have emphasized primarily the location of the claimant when injured. If the plaintiff were on base at the time recovery has been denied; while if the injury happened off the base, the claim is allowed. These decisions deny recovery to a serviceman on leave, pass, or furlough if he is injured before he leaves the base. Cases illustrating this view include Coffey v. United States, 324 F.Supp. 1087 (1971), Snyder v. United States, 118 F.Supp. 585 (1953) and Sapp v. United States, 153 F.Supp. 496 (1957).

These decisions deny recovery to servicemen who apparently could recover in other jurisdictions interpreting incident-to-service differently. In Downes v. United States, 249 F.Supp. 626 (D.C.N.C. 1965) recovery was allowed where a serviceman on a one-day pass was injured while still on the base although attempting to leave.

Two subsequent decisions of the Supreme Court have discussed Feres and are responsible for leading another group of courts to define incident-to-service in still another fashion.

Neither decision, United States v. Muniz, 374 U.S. 150 (1963) and United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed., which are discussed at length in the next section of appellant's brief, concerned servicemen. But in each, the government's contentions that Feres principles were applicable were rejected. Both Muniz and Brown emphasized particularly that Feres involved a "peculiar and special relationship of the soldier to his superiors."

This view was carried further by the court in Lee v. United States, 400 F.2d 558 (1968), where it was noted that all the rationale on which Feres was originally based have been discredited except for the federal relationship between a soldier and his government; and a new test was proposed basing recovery on the "official relationship" involved.

This concept tries to determine whether or not the claimant was, at the time of the injury, subject to military orders. The cases involving military personnel injured while flying on a military aircraft but not on military missions, Archer, supra, p.549, and Fass v. United States, 191 F. Supp. 367 (1961) illustrate this interpretation of incident-to-service.

Finally, the broadest construction of the standard is shown by the decisions in Shults v. United States, 421 F.2d 170 (5th Cir. 1969) and Buer v. United States, 241 F.2d 3 (7th Cir. 1956). Both cases concerned injuries sustained in military hospitals because of medical malpractice. In each case the serviceman was brought to the hospital following an automobile accident while on leave. Both courts rejected the Feres-Brooks on active duty-off active duty criterion in favor of a military-non-military status distinction.

> "It is true that Shults was injured while on leave and that the leave was never formally cancelled prior to his death. Nevertheless, it is obvious the injured man could not have been admitted, to the naval hospital except for his military status. He was there treated by naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be in the course of activity incident-to service." Shults, supra. p.171-172.

Thus, it can be seen the failure of the Supreme Court to precisely define incident-to-service has led to much confusion in that different courts are applying varying standards in deciding servicemen's claims. As shown, the difficulty of applying a vague criterion has led to situations where recovery has been granted to some servicemen, such as the claimant in Downes, supra, p.628 whose claim would have been denied in other jurisdictions.

This confusion and unfairness to servicemen can only be eliminated by a reconsideration of the entire incident-to service concept. The present standard is unworkable because as illustrated in the next section it has been applied in a discriminatory manner also leading to even more injustice to servicemen.

IV

INCIDENT-TO-SERVICE STANDARD: AN ARBITRARY DISCRIMINATION AGAINST SERVICEMEN

In addition to the opposition to the incident-to-service standard as an adequate test on which to fairly base an injured person's recovery, the broad construction placed on that concept unjustly discriminates against servicemen.

Federal prisoners who were not allowed to sue under the Federal Tort Claims Act prior to 1963 were granted the right in United States v. Muniz,

374 U.S. 150, 83 S.Ct. 1850, 10 L. Ed 2d 805 (1963). This case was significant for several reasons. The decision overruled a long line of lower court decisions holding prisoners' claims were impliedly excluded from the coverage of the Act. James v. United States, 280 F.2d 428 (1960). The contention that the principles laid down in Feres - an existing compensation system, a special federal relationship, and an adverse effect on necessary discipline - were applicable to prisoners was emphatically rejected. Muniz, supra, p.158, 159.

It would appear peculiarly offensive to the American sense of justice that criminals incarcerated for their crimes against society should enjoy greater recourse to American courts of justice than servicemen who voluntarily subject themselves to great risk to perpetuate those very courts. This especially points up the fallacious reasoning which attempts to justify the Feres doctrine by postulating the necessity for military discipline and its breakdown if the serviceman is allowed to sue hospital personnel. Certainly the discipline required in prison is greater than that required in the Armed Forces.

Servicemen have been singled out for exclusion while other categories of claimants similarly situated are allowed to bring suit under the Act. Examination of several other classes of plaintiffs clearly shows the discriminatory nature of the incident-to-service concept,

for veterans and military dependents have been allowed recovery under the Act. In the area of medical malpractice in military hospitals, the arbitrary, discriminatory basis for excluding servicemen is most clear-for veterans and dependents are admitted to military hospitals solely because of their own status as former members of the Armed Forces or because of their spouse's or parent's military service.

Veteran's claims are significant in pointing out the discrimination involved in the Feres doctrine. Like servicemen on active duty, veterans have available military compensation benefits. Also, like the present case, the most frequent type of claim sued on by veterans under the Act is that arising from an injury sustained during the course of treatment in a V.A. hospital. Neither reason prevents recovery under the Act.

Discrimination based on the arbitrary incident-to-service standard is even more apparent in cases where the injured claimant is the wife or child or other next of kin of a serviceman. Dependents may recover for their own injuries due to negligence of government employees. Williams v. United States, 435 F.2d 804 (1970) and Hall v. United States, 314 F.Supp. 1135 (1970).

Moreover, the serviceman himself may recover under the Act for damages suffered by him as a result of injuries to his wife or child. Steeves v. United States, 294 F.Supp. 446 (1968).

Like the majority of claims asserted by veterans, most of the injuries involving recovery by military dependents occur in government hospitals. Many of the remaining cases occur on the military bases where the dependent's spouse or parent is on active duty.

Clearly, the dependent is admitted to the military hospital only because of the serviceman's military status. Surely, the dependent's presence on a military base is "incident" to someone's service. It is discrimiantion to stretch the concept of incident-to-service so out of proportions where servicemen are concernined that the government may contend a quail hunting accident injuring a soldier on leave is "incident-to-service" Hand v. United States, 260 F.Supp.38, 41 (1966) and to blindly state these injuries to dependents are not "incident".

V

INCIDENT-TO-SERVICE STANDARD: DISCRIMINATORY AS APPLIED

Even more compelling reasons for reconsidering the confusing and unjust Feres doctrine are found when the discriminatory manner in which it is applied is examined.

The most glaring examples of this irrational discrimination are found in those cases following Brooks which permit suit by servicemen injured while on pass, leave or furlough. This incongruously results in the situation where the serviceman injured in the

performance of actual military duty has the limited recourse of compensation benefits, while the serviceman injured on furlough is allowed both the statutory and judicial remedy. George Washington L. Rev., Vol. 20, p.90, 105 (1951).

The basis for the Feres doctrine, as redefined by the Supreme Court in Brown, supra, p.112 rests now entirely on the special and peculiar relationship between a serviceman and the government he serves. If this relationship is in fact so special and so unique, how can it be broken by leave or a furlough? How can it be held this relationship is so peculiar that a statute sweeping away sovereign immunity cannot apply to it while other cases decide this unique relationship may be magically dispelled by a mere 24-hour pass?

Several courts have attempted to justify the vastly different recoveries available to servicemen on leave and to those on active duty status. The Feres decision itself distinguished Brooks on this basis, "The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under the compulsion of no orders or duty and on no military mission. Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders." Feres, supra, p.146

Meagher, the injured serviceman herein, was likewise not under the compulsion of any duty or orders and certainly admission to a hospital for a non-service

connected elective surgery is not a military mission.

In a Third Circuit decision, the court said concerning Brooks, "The only reason the plaintiff in Brooks was able to maintain his action at all, in the light of Feres, was that at the time of injury he was made in the posture of a private citizen rather than a serviceman." Feeley v. United States, 337 F.2d 924, 933 (1964).

The above rationale have been criticized as unjust discrimination. One commentator has written:

> "It would appear under Brooks tort recovery would be awarded to military personnel who suffer injuries while they are absent without leave or in desertion, while under Feres denying benefits to those servicemen injured while in the performance of duties incident to their service."

Viewed objectively all the above justifications of the Brooks decision are invalid to sustain the gross inequities which its application entails. Taking an oath to serve in the Armed Forces is no more sufficient to strip an individual of his rights and privileges as a citizen than is the taking of an oath to become an attorney, a doctor, or a non-military government employee. The state laws regarding criminal conduct, domestic relations, commercial transactions, to name only a few areas, apply to servicemen as well as to other citizens; there

should be no distinction made in the application of tort laws.

There are many times when servicemen are "under the compulsion of no orders or duty and on no military mission" in addition to leave and furloughs. The description is just as applicable to the soldier washing his car on the base where he works on an afternoon when all personnel in his unit were relieved of duties. Ritzman, supra, p.664. The phrase also aptly describes servicemen in a hospital for elective surgery.

However, there is a more basic objection to recoveries for servicemen allowed under Brooks that would be barred by Feres where only one of many circumstances changed slightly. While on leave, the statement found in the decision, his conduct is then subject to the control of no one but himself, Feres, supra, p.146, is unwarranted.

A pass does not mean that a serviceman is not subject to military discipline and military orders. Rutgers Law Review p.316. Servicemen on leave are subject to orders given by military police. Healy v. United States, 192 F.Supp.325. And all leaves and furloughs are subject to cancellation, instantly recalling the soldier or sailor to active duty.

VI

BASES OF THE FERES DOCTRINE ERODED BY SUBSEQUENT DECISIONS OF THIS COURT

Originally the Feres doctrine

was based on four rationale. These included the absence of analogous private liability in like circumstances; the special relationship of the soldier to his superiors and to the government he serves; the unfairness of permitting service-incident claims to be determined by local law; and the existence of a uniform and comprehensive system of compensation and benefits available as a remedy. Feres, supra, p.141-146.

Subsequent decisions of the Supreme Court have weakened many parts of this rationale. Schwager, supra, p.263.

The lack of precedent basis for denying servicemen the right to sue the government was expressly rejected in Rayonier Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed 2d 354 (1957):

> "It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." Ibid., p.319.

The contention that prejudice would result from the lack of uniformity of local laws was rejected in Muniz, the landmark case granting federal

prisoners the right to sue under the Tort Claims Act.

> "Without more definite indication of the risks of harm from diversity, we conclude that the prison system will not be disrupted by the application of Connecticut law in one case and Indiana law in another to decide whether the government should be liable to a prisoner for the negligence of its employees." Muniz, supra, p.162.

The system of compensation and benefits available to servicemen has little weight as a reason for denying claims. The soldier in Brooks who recovered had available to him the very same benefits. Brooks, supra, p.53. The veteran who recovered in Brown was not denied a remedy under the Act although he was eligible to receive certain benefits. Brown, supra, p.113.

The court in Brooks had no difficulty in allowing recovery despite the distinctly federal relationship. Although the serviceman is at all times subject to military law and discipline, he is still a citizen; and generally his military status does not relieve him of the rights and duties incident thereto. Furthermore, as the military has modernly assumed the aura of a civilian army, there is less reason today for discriminating against the serviceman except in those particularly military

aspects of his life. Ibid., p.467.

VII

MEDICAL NEGLIGENCE CASES DISTINGUISHABLE

The reasoning behind Feres has since been narrowed to rest primarily upon the unique relationship between a serviceman and his government. Appellant's Brief, Section V p.31. Hence, it is valid for the court to reconsider the relationship involved and the effect on military discipline that would result from servicemen's claims.

There is a difference between the relationship of a serviceman to his superior officers and that of a serviceman-patient to his military doctor. Military surgeons consider themselves doctors first and members of the military secondarily. Doctors do not need the threat of military discipline in order to have their medical orders obeyed. The control over patients exercised by a civilian doctor in a private hospital is not less than that demanded in a military hospital.

Furthermore, the command duties required of military doctors relate to junior members of the hospital staff; their only duties toward patients are non-military in nature. It is especially difficult to consider a surgeon operating on an unconscious patient, like Meagher, to be exercising any official, military or command

duties toward his patient during the surgery.

The unique relationship between servicemen such as plaintiff Meagher and the surgical personnel who rendered him completely helpless was that of patient-physician not soldier-officer.

The military hospital, even though it may be located on the base, is remote from the mainstream of military life. Recoveries for injuries sustained from medical negligence are common in the non-military world; a suit of this kind could not have any effect at all on military discipline in other areas.

It must be recognized many situations in the military merely duplicate their counterpart in civilian life for which the rationale of maintaining discipline is of dubious significance. Hastings Law Journal, supra, p.1293. The hospital in the United States operated as a gratuity for peacetime servicemen is the prime example of such a facility.

The government has no duty to furnish servicemen with medical or hospital care. The provision of medical care is known to be an activity in which error can result in grievous injury or death. The government should not be free to voluntarily enter into this activity without accepting responsibility for all injuries to all patients which are the result of medical negligence.

The undertaking of the government in providing medical services is analogous to the functions performed in the Indian Towing Co. case. Indian Towing Co.v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L. Ed.48 (1955). That case involved a claim for damages to a vessel and its cargo resulting from the grounding of the vessel because of the failure of a light in a lighthouse maintained by the Coast Guard.

It was held the Act imposes liability on the United States "in the same manner and to the same extent as a private individual under like circumstances, not under the same circumstances. Hence, if the government undertakes to warn the public of danger and thereby induces reliance, it must perform its good samaritan task in a careful manner or answer in damages." Ibid. p.64,65.

In Indian Towing an important factor was that the government had induced reliance by the plaintiff. Ibid. p. 65. In a similar manner the military hospitals have offered services to servicemen comparable to those available privately without warning them that there is no recovery for negligently caused injuries.

The most unjust decisions in this area involve cases like the present one where the plaintiff was injured due to medical negligence in the course of elective surgery. Lowe v. United States, 440 F.2d 452 (1971) and

Henninger, supra. Had the military patients been fully informed they would be precluded from recovering for any possible negligence, it is possible they would have had the surgery performed privately. The military hospitals have a duty to warn these patients, and that duty was breached in Meagher's case.

A further reason for distinguishing medical negligence suits from those against non-medical superior officers is that medical officers would be liable for the identical act, if negligence were proven, were they acting as private physicians. Most military doctors carry insurance to compensate victims of their malpractice.

One major reason behind the Feres doctrine is the lack of precedent for suits by servicemen and the lack of any standard on which to determine negligence. By the very nature of war and its incident activity, the military cannot be held to any ordinary standard of due care. St. John's Law Review, supra, p.469.

However, this difficulty is not present where medical malpractice is concerned. There are readily available standards of care by which to judge medical and surgical acts. There is every reason to treat military malpractice suits differently from negligence that occurs in the mainstream of military life.

Additionally, although it can be

argued servicemen assume the risk of certain risks and hardships of a non-justifiable nature by reason of this occupation, it cannot be said they include poor medical diagnosis and treatment except under combat conditions. Service personnel have a right to expect proper medical and hospital care and to recover damages when they are injured because of negligence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

DATED: May 6, 1977.

Respectfully submitted,

RICHARD F. GERRY
Attorney for
Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY G. MEAGHER, an incompetent person by and through his Guardian ad Litem, DOROTHY O. MEAGHER, Plaintiff-Appellant, vs. UNITED STATES OF AMERICA, Defendant-Appellee	No. 75-2458 MEMORANDUM

[February 7, 1977]

Appeal from the United States District Court for the Southern District of California

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BEFORE: HUFSTEDLER and WRIGHT, Circuit Judges, and LYDICK,* District Judge.

We do not perceive any significant distinction between this case and Feres v. United States, 340 U.S. 135 (1950). The result is extremely harsh, but unless and until the Supreme Court overturns or modifies Feres, we are compelled to follow it.

AFFIRMED.

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*Honorable Lawrence T. Lydick, United States District Judge, Central District of California, sitting by designation.

No. 76-1550

In the Supreme Court of the United States

OCTOBER TERM, 1976

JERRY G. MEAGHER, BY AND THROUGH HIS GUARDIAN AD LITEM, DOROTHY O. MEAGHER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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While on active duty with the United States Navy, petitioner had elective surgery performed at the Naval Regional Medical Center in San Diego to remove a small lipoma located in his arm. Petitioner's guardian instituted this suit in the United States District Court for the Southern District of California under the Federal Tort Claims Act, claiming that petitioner had been injured by the alleged negligence of surgical personnel at the military hospital during the operation. The district court dismissed the suit on the authority of *Feres* v. *United States*, 340 U.S. 135, and the court of appeals affirmed *per curiam* (Pet. App. A).

In *Feres*, this Court held that the government is not liable under the Federal Tort Claims Act for the death or injury of members of the armed forces sustained incident to their service. That principle governs this case. Since there is no conflict regarding its application to active duty servicemen injured during surgical operations performed in military hospitals, this case presents no issue warranting review by this Court.

Although petitioner contends that the "incident to service" standard is "vague and imprecise" (Pet. 13) and should not apply to medical negligence cases (Pet. 27), the courts have consistently ruled that if an operation is performed on an active duty serviceman in a military hospital, any injury to him arises in the course of activity incident to service. See *Alexander* v. *United States*, 500 F. 2d 1 (C.A. 8), certiorari denied, 419 U.S. 1107; *Harten* v. *Coons*, 502 F. 2d 1363, 1365 (C.A. 10), certiorari denied, 420 U.S. 963; *Lowe* v. *United States*, 440 F. 2d 452 (C.A. 5), certiorari denied, 404 U.S. 833; *Shults* v. *United States*, 421 F. 2d 170 (C.A. 5); *Chambers* v. *United States*, 357 F. 2d 224 (C.A. 8); *Buer* v. *United States*, 241 F. 2d 3 (C.A. 7). The Court in *Feres* explicitly made its holding applicable to medical negligence cases (340 U.S. at 136-137), and as the court of appeals stated in *Lowe* v. *United States*, *supra*, 440 F. 2d at 452-453, in barring a suit alleging negligence by military doctors in the performance of elective surgery:

> [I]t is obvious that the [plaintiff] could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was there treated by Naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be "in the course of activity incident to service."

Petitioner contends that the exclusion of coverage for servicemen constitutes "arbitrary discriminat[ion]" (Pet. 20). But servicemen do not constitute a "suspect class," and their exclusion from coverage is permissible, so long as it is supported by some "reasonable basis." See *Dandridge* v. *Williams*, 397 U.S. 471, 485-486. This Court recently reiterated that the "distinctively federal" relationship between the government and members of the armed forces, the presence of the Veterans' Benefits Act as a substitute for tort liability, and the "effects of the maintenance of such [tort] suits on [military] discipline" supported the decision by Congress to except military personnel from coverage under the Federal Tort Claims Act.[1] *Stencel Aero Engineering Corp.* v. *United States*, No. 75-321, decided June 9, 1977 (slip op. 5).

Petitioner claims hardship in being denied the type of tort recovery he might have obtained had he not been in military service.[2] But, recognizing the possibility of hardship, this Court said in *Feres* that "if we misinterpret the Act, at least Congress possesses a ready remedy." 340

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[1]While petitioner asserts that "vast changes have occurred within the military" (Pet. 11) which undermine the rationale of the *Feres* doctrine, he fails to explain how the inception of an all-volunteer army, for example, has any bearing on the necessity for military discipline, the soldier's unique relationship to the government, or the functioning of the veterans' compensation statutes. Similarly, petitioner contends that *Feres* has been undercut by decisions recognizing that tort claims may be brought by prisoners and civilians (Pet. 25-26, 29). But these decisions are not inconsistent with the reasoning in *Feres*, which is based upon the special situation of the military relationship and its accompanying compensation scheme, and which this Court recently reaffirmed in *Stencel Aero Engineering Corp.*, *supra*.

[2]The Veterans' Administration advised that petitioner is currently receiving veteran's disability of $1,755.75 per month.

U.S. at 138. *Feres* was decided in 1950, and in the ensuing 26 years, Congress has not changed it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

DOJ-1977-06